WHAT IS THE LAW MERCHANT?

In a recent book of unusual originality, we find the following statement: "The phrase 'law merchant,' like many another, is uncritically employed in handy explication of seeming anomalies. As objections to the Mosaic cosmogony, presented by the existence of fossils, were allayed by convenient reference to omnipotence, so perplexing questions relating to negotiable instruments are waived by unthinking allusion to the 'law merchant.' Omnipotence and law merchant work their arbitrary will, and are irreducible and distracting."[1] A little later in the volume, the author writes: "As a matter of fact, and not merely of phrase, may we not even ask whether there is a law of merchants, in any other sense than there is a law of financiers or a law of tailors? Frequent use of the word has almost produced the impression that as there was a civil law and a canon law, so also there was somewhere a 'law merchant,' of very peculiar authority and sanctity; about which, however, it is now quite futile to inquire and presumptuous to argue."

Mr. Ewart does not claim that these views accord with the opinions which pervade judicial decisions and standard treatises. On the contrary, he frankly admits that judges and writers of the greatest eminence and learning have held views diametrically opposed to his. The object of the present article is to inquire whether The Law Merchant ought to be dismissed as a mere phrase.

Law Merchant Procedure.

It is quite certain that, as early as the middle of the thirteenth century, cases between merchants were conducted according to a procedure quite unlike that of common law courts. Bracton tells us that the summons in such cases need not be served fifteen days before the defendant was bound to answer, as it had to be in common law actions. His language is: "Likewise, on account of persons who ought to have speedy justice, such as merchants, to whom speedy justice is administered in courts of pepoudrous, * * * the time of summons is reduced."[2] Again, in

[1] Ewart on Estoppel, 370. [2] Bracton, De Legibus Anglicæ, l. v. f. 334 a.

actions against merchants "the solemn order of attachments ought not to be observed," Bracton declares, "on account of the privilege and favor of merchants."[1] Nor are these the only respects in which the procedure of the ancient law merchant differed from that of the common law. In an action of debt, the common law permitted the defendant to wage his law, that is to deny the debt by his own oath, and by the oaths of eleven neighbors, or compurgators, who swore that they believed his denial was the truth.[2] This was not allowed, however, by the law merchant, in case the plaintiff supported his claim by a tally and two or more witnesses,[3] or in case the action was upon a contract between merchant and merchant beyond the seas.[4]

The very name of the earliest courts in which mercantile cases were tried indicates the character of their procedure. They are called "pepoudrous," says Coke, "because that for contracts and injuries done concerning the fair or market, there shall be as speedy justice done for the advancement of trade and traffick, as the dust can fall from the foot, the proceedings there being *de hora in horam*."[5] And Blackstone declares: "The reason of their original institution seems to have been to do justice expeditiously among the variety of persons that resort from distant places to a fair or market; since it is probable that no inferior court might be able to serve its process, or execute its judgments, on both, or perhaps either, of the parties; and therefore, unless these courts had been erected, the complainant must have resorted, even in the first instance, to some superior judicature."[6]

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[1] *Ibid.* l. vi, 444 a.

[2] Pollock and Maitland's History of English Law, Vol. 2, p. 212. Select Civil Pleas, pl. 146. (1203). [3] Clermont's Fortescue, 121, note.

[4] *Ibid.* 120. [5] Coke, Fourth Institute 272.

[6] 3 Blackstone's Commentaries 33. Blackstone rejects the etymology of pepoudrous given by Coke, and prefers that suggested by Barrington, in his Observations on the Statutes, who derives the term from *pied puldreaux*, which, in old French, signifies a pedlar. "The court of Pipowder" (as Barrington spells the word,) is "the court of such petty chapmen", or pedlars and "low tradesmen" as resort to fairs and markets. See Barrington's Observations, (2d ed. 1766.) 321, 322. To Barrington and Blackstone, courts pepoudrous were only a name. It was easy for them to picture these tribunals as of small consequence, and as dealing with trifling disputes. In Coke's time, they held an important place in the judicial system. Two centuries earlier, they had so extended their jurisdiction by an ingenious fiction as to call forth an act of parliament reducing them to their original limits. 17 Ed. iv. Ch. 2.

The expedition of these courts was in striking contrast with the slow and stately procedure of the common law tribunals, which were not always open to suitors. Their proceedings, even during term time, were not from hour to hour throughout the day. They took plenty of time to deliberate. Sir John Fortescue, writing about the middle of the fifteenth century, gives this account of them: "You are to know further, that the judges of England do not sit in the King's courts above three hours in the day, that is from eight in the morning till eleven. The courts are not open in the afternoon. The suitors of the court betake themselves to the *pervise*, and other places, to advise with the Sergeants at Law, and other their counsel, about their affairs. The judges when they have taken their refreshments spend the rest of the day in the study of the laws, reading the Holy Scriptures, and other innocent amusements at their pleasure. It seems rather a life of contemplation than of action."[1]

Merchants were men of action, and the contemplative habit of English common law judges did not fall in well with their necessities. They insisted upon having not only justice but speedy justice. This was secured to them in a measure, as we have seen, by the institution of a court pepoudrous as an incident of every fair and market throughout England. The statute of the Staple[2] provided additional courts for the relief of merchants. One of its

[1] Sir Henry Spellman offers a very different and less complimentary explanation of the judicial habit of limiting sittings to the forenoon. This is his language. "It is now to be considered why high courts of justice sit not in the afternoon * * * Our ancestors and other northern nations being more prone to distemper and excess of diet used the forenoon only, lest repletion should bring upon them drowsiness and oppression of spirits. To confess the truth our Saxons were immeasureably given to drunkenness." He adds that judges do sit from morning to evening, in great causes, but without dinner or intermission, for "being risen and dining, they may not meet again." It is because of this tendency to drunkenness, he thinks, that jurors were prohibited from having meat, drink, fire or candle light "till they agreed of their verdict."—Spellman's The Original Terms. (1614), Sec. V. Chap. 1.

[2] 27 Ed. III. Statute 2 (1353:) This statute enacted "That the staple of wools, leather, woodfels and lead shall be perpetually holden at the places underwritten, that is to say, for England, at Newcastle upon Tine, York, Lincoln, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter and Bristol; for Wales, at Kaermerdyn; and for Ireland at Devylen, Waterford, Cork and Drogheda."

chief objects was declared to be, "to give courage to merchant strangers to come with their wares and merchandise into the realm."[1] It recognized the fact "that merchants may not often long tarry in one place for levying of their merchandises," and accordingly promised "that speedy right be to them done from day to day, and from hour to hour, according to the laws used in such staples before this time holden elsewhere at all times."[2] It provided for the election of a mayor and constable of the staple, by the merchants of each staple town, and gave to such mayor complete jurisdiction over all mercantile transactions.[3] In order to secure these mercantile courts from encroachments on the part of the common law tribunals, the statute declared that, "In case our bench or common bench, or justices in eyre or justices of assize, or the place of the marshalsea, or any other justices come to the places where the said staples be, the said justices nor stewards, nor marshals, nor of other the said place shall have any cognizance there of that thing, which pertaineth to the cognizance of the mayor and ministers of the staple."[4]

That the procedure in these statutory courts of the staple towns was not that of the common law, but was that of the law merchant, is expressly stated in the statute. Chapter 21 required the mayor of the staple to have "knowledge of the law merchant," and "to do right to every man after the law aforesaid." Chapter 8 provided "that all merchants coming to the staple shall be ruled by the law merchant, of all things touching the staple, and not by the common law of the land, nor by the usage of cities, boroughs or other towns;" although it gave merchants the right to sue before the justices of the common law if they preferred to do so. The language of chapter 20 is very significant: "Item, because we have taken all merchants strangers in our said realm and lands into our special protection, and moreover granted to do them speedy remedy of their grievances, if any be to them done, we have ordained and established, That if any outrage or grievance be done to them in the country out of the staple, the justices of the place where such outrages shall be done shall do speedy justice to them after the law merchant from

[1] *Ibid.* ch. 2. [2] *Ibid.* ch. 19, § 2. [3] *Ibid.* ch. 21 and ch. 8. [4] *Ibid.* ch. 5.

day to day and from hour to hour, without sparing any man or to drive them to sue at the common law."

The procedure, then, in the statutory courts of the staple was that of the law merchant, and was very different from that of the common law. It was a procedure with which merchants were familiar. The statute does not describe it, but assumes that its peculiarities are a matter of common knowledge. It was the procedure which was then in use in such staples, or markets, "holden elsewhere."[1] It was summary, swift and sure. It was the procedure of courts pepoudrous. It was the procedure of "the Law Merchant which prevailed in similar form throughout Christendom."[2] Whenever a merchant was a suitor in one of these courts, an ancient writer assures us, he was "*in loco proprio*, as the fish in the water, where he understandeth himself by the custom of merchants, according to which merchants' questions and controversies are determined."[3]

The Substantive Law Merchaut.

But the ancient law merchant was something more than a system of procedure, devised to secure the speedy settlement of merchants' controversies. It was a body of substantive law. It is referred to as such in several of the extracts given above from the statute of the staple. In chapter eight, as we have seen, it is contrasted with "the common law of the land," and it was provided that pleas concerning mercantile matters should be sued "before the justices of the staple by the law of the staple," (which had previously been defined as the law merchant,) while "pleas of land and of freehold shall be at the common law."[4] It was recognized as a distinct body of substantive law in a charter of Henry III,[5] which recites that "pleas of merchandise are wont to be decided by law merchant in the boroughs and fairs." Fortescue contrasts it with the common law, when he declares that "in the courts of certain liberties in England, where they proceed by the

[1] *Ibid.* ch. 19, § 2. [2] Cunningham's Western Civilization, Vol. 2, p. 95.

[3] Malynes' Lex Mercatoria, Chap. XVI. p. 308. (1622).

[4] 27 Ed. III, St. 2, ch. 8, § 7.

[5] Norton's History of London, Book II, Chap. XIX. The ninth charter of Henry III, granted 1268.

law merchant, touching contracts between merchant and merchant beyond seas, the proof is by witnesses only."[1]

Coke repeatedly refers to the lex mercatoria as a body of substantive law. In his notes to § 3, of the First Institute, he says, "There be divers laws within the realm of England," which he proceeds to name. The fourth class of these laws is "The common law of England," while the twelfth is "Lex Mercatoria, merchant, &c." In the fourth institute, he writes: "The Court of the Mayor of the Staple is guided by the law merchant, which is the law of the staple. * * * This Court (though it was far more ancient) is strengthened and warranted by act of parliament.[2] * * * It was oftentimes kept at Callice, and sometimes at Bridges in Flanders, and at Antwerpe, Middleburgh, &c., and therefore it was necessary that this Court should be governed by the law merchant."[3]

Malynes, in his "Lex Mercatoria or Ancient Law Merchant,"[4] writes for the man of business rather than for the lawyer, but he has much to say of the law merchant. In his "Epistle Dedicatory" to King James, he declares the "Law Merchant hath always been found *semper eadem;* that is, constant and permanent, without abrogation, according to the most ancient customs, concurring with the Law of Nations in all Countreys." He informs "The Courteous Reader," in his preface, that he "intitled the book according to the ancient name of Lex Mercatoria, and not Jus Mercatorium; because it is a customary law, approved by the authority of all kingdoms & commonwealths, and not a law established by the soveraignty of any Prince, either in the first foundation, or by continuance of time." Earlier in the preface, he writes, "Reason requireth a law not too cruel in her frowns, nor too partial in her favors. Neither of these defects are incident to the Law Merchant, because the same doth properly consist of the custom of merchants, in the course of traffick, and is approved by all Nations, according to the definition of Cicero, *Vera lex est recta Ratio Natura congruens, diffusa in omnes constans sempiterna.*" Later, he refers to the Lex Mercatoria as "made and

[1] Clermont's Fortescue, 120.

[2] The author refers to 27 Ed. III St. 2 and quotes at length from ch. 21.

[3] Coke's Fourth Institute Chap XLVI.

[4] The first edition was published in 1622.

framed of the Merchants' Customs and the Sea Laws." Several chapters of the book are devoted to an account (rather desultory it must be admitted) of the various methods for the determination of merchants' causes and controversies. Seafaring causes, as he styles them, are determined in the Admiralty Court. Other controversies may be decided either by arbitrators chosen by the parties, or by merchants' courts, or by the chancery, or by the common law courts. Even when actions are brought in the courts of common law by merchants, he declares, "That the Law Merchant is predominant and over-ruling, for all Nations do frame and direct their judgments thereafter, giving place to the antiquity of Merchants' Customs, which maketh properly their Law, now by me methodically described in this Book."[1]

Of the common law, in its specific sense, that is of the system of legal rules and procedure administered in the common law courts, the author seems to have had a poor opinion. Among other flings at it is this: "In chancery every man is able by the light of nature to foresee the end of his cause, and to give himself a reason therefor, and is therefore termed a cause; whereas at the common law, the Clyent's matter is termed a case, according to the word *Casus*, which is accidental; for the Party doth hardly know a reason why it is by Law adjudged with or against him." After thus paying his compliments to the technical, dilatory and uncertain common law, he proceeds: "Merchants' causes are properly to be determined by the Chancery, and ought to be done with great expedition; * * * for the customs of merchants are preserved chiefly by the said court, and above all things Merchants' affairs in controversie ought with all brevity to be determined, to avoid interruption of traffick, which is the cause that the Mayor of the Staple is authorized by several acts of parliament to end the same, and detain the same before him, without dismission of the common law."[2] In a later chapter on "The Ancient Government of the Staple," the author says that "the laws and ordinances made by the said merchants" in the staple towns "were called staple laws,"[3] which, as we have seen, is but another name for the law merchant.

[1] Lex Mercatoria, Chap. XIV. [2] Lex Mercatoria, p. 303. [3] *Ibid.* p. 337.

The controversy between the admiralty and the common law courts for jurisdiction, which culminated during the chief justiceship of Lord Coke, elicited several publications in which the law merchant plays a prominent part. Perhaps, the most important of these works are Godolphin's "View of Admiralty Jurisdiction,"[1] Zouch's "Jurisdiction of the Admiralty,"[2] and Prynne's "Animadversions."[3]

Godolphin quotes with approval the statement of Sir John Davies[4] that the Law Merchant as a branch of the general law of Nations has "been ever admitted, had, received by the Kings and people of England, in causes concerning merchants and merchandizes and so is become the law of the land in these cases." He looks upon the law merchant as "a law of England, though not the law of England." Upon this point, he agrees with Lord Coke and treats the common law as well as the law merchant as two distinct but constituent elements of English jurisprudence.

Zouch calls attention to the fact that "Sir Edward Coke, in his comment upon Littleton, mentions the Law Merchant as a Law distinct from the Common Law of England," adding, "And so doth Mr. Selden mention it in his Notes upon Fortescue." He then quotes at length from Sir John Davies' "Manuscript Tract touching Impositions,[5] laying especial stress upon the writer's views, probably because of his eminence as a common lawyer and of the friendly personal relations which he had sustained with Coke. According to the writer, "Both the common law and Statute laws of England take notice of the law merchant, and do leave the causes of merchants to be decided by the rules of that law; which Law Merchant, as it is a part of the Law of Nature and Nations, is universal, and one and the same in all countries of the world." "Whereby," remarks Dr. Zouch,[6] "It is manifest that the causes concerning merchants are not now to be decided by

[1] Published 1661. See pp. 126, 127.

[2] Prepared for publication prior to 1663, but first published in 1686.

[3] Published in 1669.

[4] Davies on Impositions, written about 1600 and first published 1656.

[5] As Dr. Zouch refers to this work as a "manuscript tract," it would appear that his own treatise must have been written before the publication of "The Impositions" in 1656. [6] The Jurisdiction of Admiralty, 89.

the peculiar and ordinary laws of every country, but by the general laws of Nature and Nations." Sir John Davies is quoted further as saying: "That until he understood the difference betwixt the Law Merchant and the Common Law of England, he did not a little marvel, that England, entertaining traffick with all nations of the world, having so many ports and so much good shipping, the King of England being also Lord of the Sea, what should be the cause that, in the books of the Common Law of England there are to be found so few cases concerning merchants or ships: But now the reason thereof was apparent, for that the Common Law of the Land did leave those Cases to be ruled by another Law, namely, the Law Merchant, which is a branch of the Law of Nations."

Prynne points to this absence of "precedents of suits between merchants and mariners in the common law courts" as conclusive evidence that those courts had not formerly claimed jurisdiction of them, and declares that actions for breach of maritime contracts had always been "brought in the Admiral's Court, and there tried, judged in a summary way, according to the laws of merchants and Oleron, not in the King's Courts at Westminster, who proceeded only by the rules of the Common Law."[1]

The Law of Merchants a True Body of Law.

It is apparent, we submit, from the foregoing authorities, that for several centuries there was a true body of law in England which was known as the law merchant. It was as distinct from the law administered by the common law courts, as was the civil or the canon law. It was a part of the unwritten law of the realm, although its existence and its enforcement had been recognized and provided for by statutes. Until the Seventeenth Century, it was rarely referred to in common law tribunals. Courts pepoudrous, staple courts or courts of merchants, the admiral's court and the Chancery dealt with the cases which were subject to its rules. During the seventeenth century staple courts ex-

[1] Prynne's Animadversions, 83. On pp. 95, 96, he speaks of the Admiral's Court as proceeding according to the "law of merchants, Oleron and the civil law," and on p. 102 he refers to the "civil law, of merchants and Oleron."

pired[1] with the decay of the staple trade; and the courts pepoudrous[2] lost much of their importance. Their decisions were subject to review by common law judges, who did not hesitate to pursue towards them the policy which they had adopted towards the admiralty, of limiting their jurisdiction within the narrowest bounds, and of enticing or coercing their suitors into the courts of common law.

While the staple courts and kindred tribunals were dying out, mercantile cases were necessarily finding their way into the common law courts. How should the common law judges deal with them? These judges were not selected, as the mayors of the staple had been chosen, because of their knowlege of the law merchant. Nor were the common law jurors taken from the commonalty of merchants. It became necessary, therefore, in a case involving the law merchant, to prove what the rule of that law applicable to the case was, unless, indeed, the rule were one of such common application, that the judge would take judicial cognizance of it. In other words, the law merchant "was proved as foreign law now is. It was a question of fact. Merchants spoke to the existence of their customs as foreign lawyers speak to the existence of laws abroad. When so proved, a custom was part of the law of the land."[3] This condition of things existed for about a century and a half—from the appointment of Coke as

[1] Coke intimates that the only staple court in existence when he wrote his Fourth Institute was that "holden at the Wool Staple at Westminster." Fourth Institute, p. 237, Prynne says "the Court of the Mayor of the Staple is now expired," Animadversions, p. 175.

[2] It is rather curious that these courts gained a new lease of life in some of the American Colonies. In 1692 New York passed an act "for the Setling of Affaires and Marquets' in each respective City and County throughout the Province," which provided for a "Governor or Ruler" of each fair with power "To have and to hold a court of Pypowder together with all Libertys and free customs to such appertaining," and to hear "from day to day and hour to hour, from time to time all Occasions plaints and pleas of a Court of Pypowders together with summons, attachments, arrests, issues, fines, redemptions and commodyties and other rights whatsoever to the same Courts of Pypowder any way appertaining." In 1773, these provisions were extended to new counties and to additional fairs and markets authorized in newly settled parts of the colony. The Colonial Laws of New York, Vol. 1, p. 296; Vol. 5, p. 589.

[3] Macdonell's Introduction to Smith's Mercantile Law. 2d ed., lxxxiii.

Lord Chief Justice in 1606 to the accession of Lord Mansfield in 1756[1].

The Law Merchant a Body of Trade Customs.

During this second period in the development of the law merchant, the term loses much of the definiteness which characterized it during the first period. It is not employed to designate a well-known body of legal rules which are administered in certain courts, but rather those trade usages whose existence had been established to the satisfaction of the regular tribunals, and which those tribunals were willing to enforce in cases growing out of mercantile disputes. Of this period Mr. Scrutton says[2]: "And as the Law Merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the custom from the facts;[3] as a result little was done towards building up any system of Mercantile Law in England."

The Law Merchant as The Law of All Nations.

Lord Mansfield was dissatisfied with this condition of the law and devoted his great abilities to its improvement. He was not an intense partisan of the common law like Coke, nor did he show Holt's hostility to the innovations of Lombard Street. On the other hand, he was a thorough student of the civil law, was familiar with the writings of foreign jurists and was in hearty sympathy with the desire of merchants and bankers for the judicial recognition of their customs and usages. We are told[4] that "he reared a body of special jurymen at Guildhall, who were generally retained in all commercial cases to be tried there. He was on terms of familiar intercourse with them, not only conversing freely with them, but inviting them to dine with him. From them

[1] *Ibid.* Scrutton, Elements of Mercantile Law, Chap. I.

[2] Scrutton, Elements of Mercantile Law, Chap. I.

[3] An excellent illustration of this is afforded by the Bank of England *v.* Newman. Ld. Raymond, 442 (1699). Lord Holt told the jury that when a person sold a note payable to bearer, without indorsing it, he did not become liable to the buyer; but the jury found a verdict against the seller who had not indorsed the note.

[4] Campbell's "Lives of the Chief Justices." Vol. 2, 407, note.

he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided."[1]

He discovered that the usages and customs of merchants were in the main the same throughout Europe. When a mercantile case came before him, he sought to discover not only the mercantile usage which was involved, but the legal principle underlying it. It was this habit which called forth the off-quoted eulogium of his disciple and colleague, Mr. Justice Buller: "The great study has been to find some certain general principle, not only to rule the particular case under consideration, but to serve as a guide for the future. Most of us have heard those principles stated reasoned upon, enlarged, and explained till we have been lost in admiration of the strength and stretch of the human understanding."

Lord Mansfield's methods are admirably illustrated, as Mr. Scruttan has pointed out, in the leading case of Luke *v.* Lyde.[2] The question at issue was, what freight must be paid by a shipper, in case of loss. Lord Mansfield felt quite certain, at the trial, of the proper answer to be given, but "he was desirous to have a case made of it, in order to settle the point more deliberately, solemnly and notoriously; as it was of so extensive a nature; and especially, as the maritime law is not the law of a particular country, but the general law of nations: '*non erit alia Romæ, alia Athenis; alia nunc, alia posthac: sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.*'" After thus stating his reasons for reserving the case for the formal opinion of the court, he proceeds to lay down the legal principles which must rule the case. The chief sources of these principles are the Rhodian laws, the *consolato del Mare*, the laws of

[1] Not infrequently were the verdicts of these mercantile juries upset by Lord Mansfield. In Grant *v.* Vaughan, 3 Burr, 1516 (1764) the Chief Justice left to a special jury the question whether a check payable to bearer was "in fact and practice negotiable." The jury found it was not. Whereupon, Lord Mansfield and his colleagues Justices Wilmot and Yates set aside the verdict. The Chief Justice said he thought he was leaving to the jury "a plain fact upon which they could have no doubt," but upon further consideration, he had reached the conclusion that he ought not to have left the question to them, "for it is a question of law whether a bill or note is negotiable or not, and it appears in the books that these notes (checks to bearer) are by law, negotiable."

[2] 2 Burrows 882. (1759).

Oleron and Wisby, the Ordinances of Louis XIV. and various treatises on the law merchant, and the usages and customs of the sea. It was from such sources, and from the current usages of merchants, that he undertook to develop a body of legal rules, which should be free from the technicalities of the common law, and whose principles should be so broad and sound and just, as to commend themselves to all courts in all countries. This conception of the law merchant, as a branch of the *jus gentium*, was not original with Lord Mansfield. It had found frequent expression, in former centuries, as the extracts which we have given above clearly disclose. The important fact is that the chief justice of the King's Bench—the official head of the common law bench and bar—should devote his great energies to the development of a body of legal rules which should rest not on common law principles, but upon the principles "which commercial convenience, public policy and the customs and usages of" merchants had "contributed to establish, with slight local differences, over all Europe."[1] It is this cosmopolitan character of the law merchant, to which Lord Blackburn referred in the following passage, taken from one of his great opinions: "There are in some cases, differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the law merchant are the same in all countries. * * * We constantly in English courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases when they happen to be in point; and so in a Scotch case you would cite English decisions and cite Pothier or any foreign jurist, provided they bore upon the point."[2]

The Law Merchant of To-Day.

Lord Mansfield's habit, of applying the principles of the law merchant to the decision of cases, brought in the common law courts, has been followed for a century and a half by English and American judges. The result has been an extensive amalgamation of the rules of the law merchant with those of the common law. These two bodies of rules no longer stand apart, as they did three centuries ago.

[1] Judge Story in 2 Gallison (U. S. Circuit Court) 398, 472 (1815).

[2] McLean *v.* Clydesdale Bank, 9 App. Cases, pp. 95, 105 (1883).

Each has been modified by the other and, to a great extent, has lost its separate identity. And yet it is not difficult to point out rule after rule, which has come into English jurisprudence from the law merchant, and which retains the characteristic features which it possessed, when, centuries ago, it was unknown to common law tribunals and was enforced only in merchants' courts—the courts pepoudrous, the staple courts and the like—or in the court of chancery.

Let us consider very briefly three of these. The first two are stated by Sir John Davies, in his work On Impositions, from which we have made several quotations. After declaring that the law merchant and the laws of the sea "admit of divers things not agreeable to the common law of the realm," he gives these instances: "First, If two merchants be joint owners, or partners of merchandizes, which they have acquired by a joint contract, the one shall have an action of account against the other, *Secundum Legem Mercatoriam*, but by the rule of the common law, if two men be jointly seized of other goods, the one shall not call the other to account for the same."[1] The distinction between the rights and powers of partners over firm property on the one hand, and the rights and powers of tenants in common on the other, is still due to the fact, that the former have their origin in the ancient law merchant, the latter in the equally ancient common law.[2] Second, If two merchants have a joint interest in merchandizes, if one die, the survivor shall not have all, but the executor of the party deceased, shall by the Law-merchant call the survivor to an account for the moiety, whereas by the rule of the common law, if there be two joint tenants of other goods, the survivor *per jus accrescendi* shall have all." This doctrine of non-survivorship among partners has been referred to, at times, as resting on a rule of equity,[3] but there is abundant proof of its origin in the law-merchant. In a note to a case decided by the Common Pleas in the year 1611, it is said: "It was agreed by all the justices that by the Law of Merchants, if two Merchants join in trade, that of the

[1] Quoted in Zouch's "Jurisdiction of Admiralty," 128.

[2] That this distinction is one of practical importance to-day is shown by Preston *v.* Fitch, 137 N. Y. 41; 33 N. E. 77 (1893).

[3] Lord Thurlow in Lyster *v.* Dolland 1 Ves. Jr. at p. 434 (1792).

increase of that, if one die, the others shall not have the benefit by survivour."[1] A similar statement was made by Lord Keeper North, in a chancery case decided in 1683: "The custom of merchants is extended to all traders to exclude survivorship."[2] If any doubt remains as to the origin of this doctrine it ought to be dispelled by the following extract from the Laws of Oleron: "If two vessels go a fishing in partnership, as of mackerels, herrings or the like, and do set their nets, and lay their lines for that purpose, * * * and, if it happen, that one of the said vessels perish with her fishing instruments, and the other escaping, arrive in safety, the surviving relations or heirs of those that perished, may require of the other to have their part of the gain, and likewise of their fish and fishing instruments, upon the oaths of those that are escaped."[3]

The third rule, to which we would refer, is that relating to the right of stoppage *in transitu*. How much doubt formerly surrounded the origin of this rule, is apparent from the following language of Lord Abinger, Chief Baron of the Exchequer: "In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, which the common law has adopted."[4] The learned judge then traces the course of judicial decision upon this topic, and reaches the conclusion that the earliest reported cases were based neither on principles of equity nor of common law, but on the usages of merchants. This conclusion has been approved by Lord Blackburn,[5] and by Lord Justices Brett and Bowen "The doctrine as to stoppage *in transitu*," said Lord Justice Brett, "is not founded on any contract between the parties; it is not founded on any ethical principle; but it is founded upon the custom of merchants. The right to stop *in transitu* was originally proved in evidence as a part of the custom of merchants; but it has afterwards been adopted as a matter of principle, both at law and in

[1] Hammond *v.* Jethro, 2 Brownlow 99, note.

[2] Jeffreys *v.* Small, 1 Vern. 217.

[3] Laws of Oleron, by Guy Meige, chap. xxvii. This appears as chap. xxv of the Laws of Oleron, as they are printed in the Appendix to Godolphin's View of Admiralty Jurisdiction. 1661.

[4] Gibson *v.* Carruthers, 8 M. & W. 321, 338 (1841).

[5] Blackburn on Sales (2d ed.) 317, *et seq.*

equity."[1] In the same case, Lord Justice Bowen expressed himself as follows: "The right of stoppage *in transitu* is founded upon mercantile rules, and is borrowed from the custom of merchants; from that custom it has been engrafted upon the law of England. * * * This doctrine was adopted by the Court of Chancery, and afterwards adopted by the Courts of Common Law."[2]

The Law Merchant and the Court of Chancery.

It is not strange that the doctrine of stoppage *in transitu* and the doctrine of non-survivorship among partners make their first appearance, as far as reported cases are concerned, in the Court of Chancery. We have seen that Malynes, writing early in the Seventeenth Century, declared that "merchants' causes are properly to be determined in the chancery * * * for the customs of merchants are preserved chiefly by the said Court."[3] While the various forms of merchants' courts were in active operation, merchants rarely needed to resort to the regular tribunals of the realm. But as those courts died out, during the latter part of the sixteenth and the early part of the seventeenth century, mercantile disputes had to be brought either in the common law courts or the court of chancery. After Lord Bacon's victory over Lord Coke, the jurisdiction of chancery became very extensive, and merchants were able to bring many of their disputes before that tribunal for adjudication. All the traditions of this court favored the recognition of the law merchant. As early as 1473 the chancellor had declared that alien merchants could come before him for relief, and there have their suits determined "by the law of nature in chancery * * * which is called by some the law merchant, which is the law universal of the world."[4]

Naturally, therefore, many of the rules of the law merchant have come into English jurisprudence through the Court of Chancery. Not a few of them are looked upon as the creatures of equity, when in fact they are the offspring of the law merchant, which chancery has deliberately adopted.

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[1] Kendal *v.* Marshal, 11 Q. B. D. 356, 364. [2] *Ibid.* at p. 368.
[3] Lex Mercatoria p. 303. [4] Cited in Blackburn on Sales (2d ed.) 318.